

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL 324, INTERNATIONAL UNION OF OPERATING
ENGINEERS (IUOE), AFL-CIO

Respondent

Case 07-CB-226531

and

MICHIGAN INFRASTRUCTURE AND
TRANSPORTATION ASSOCIATION, INC.

Charging Party

RIETH-RILEY CONSTRUCTION CO., INC.

Respondent

Case 07-CA-234085

and

LOCAL 324, INTERNATIONAL UNION OF OPERATING
ENGINEERS (IUOE), AFL-CIO

Charging Party

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**CHARGING PARTY UNION'S BRIEF IN OPPOSITION TO RESPONDENT RIETH-
RILEY'S REQUEST FOR SPECIAL PERMISSION TO APPEAL ORDER OF
ADMINISTRATIVE LAW JUDGE**

Charging Party Local 324, International Union of Operating Engineers (IUOE), AFL-CIO (Union), by its attorneys, files this brief in opposition to the request of Respondent Rieth-Riley Construction Co., Inc. (Rieth-Riley), for special permission to appeal the Order of the Administrative Law Judge granting the Acting General Counsel's motion to amend the Complaint in Case 07-CA-234085 to allege that a strike which began about July 31, 2019 is an unfair labor practice strike.

The consolidated trial in the above cases began in October 2018 and has proceeded through 13 days of trial before Administrative Law Judge Charles Muhl, with another 12 days of trial scheduled for May and June 2021 for continued litigation of the above cases in addition to other related cases that have been consolidated and scheduled on a calendar call basis before Judge Muhl.

The Complaint in Case 07-CA-234085 was issued on May 29, 2019 and alleged that Rieth-Riley violated the Act when it locked out its employees in the course of a 23 day statewide lockout of road construction employees of Rieth-Riley and other contractors represented by the Union, the lockout having begun on September 4, 2018.

In addition to the lockout, the Complaint alleged that Rieth-Riley unilaterally granted a wage increase to its employees in 2018 prior to the lockout without notice to or bargaining with the Union.¹ The Complaint also alleged that Rieth-Riley unilaterally deducted vacation monies from employee paychecks without notice to or bargaining with the Union.

It is well settled that the General Counsel may move to amend a complaint during or after an unfair labor practice hearing has closed but before a case has been transferred to the Board “upon such terms as may be deemed just.” Section 102.17 of the Board’s Rules and Regulations. Whether an amendment is just depends on whether the new allegations of closely related to those in the complaint and whether the timing of the amendment prejudices the Respondent. Folsom Ready Mix, Inc., 338 NLRB 1172 n 1. (2003). The Judge carefully analyzed the motion to amend under the appropriate legal standard and concluded that such an amendment was, under the circumstances,

¹ It was revealed during the course of the trial that Rieth-Riley granted similar wage increases in 2019 and 2020. Counsel for the Acting General Counsel moved to amend the Complaint to allege these wage increases; the Judge granted the motion to amend in the same order at issue herein but Rieth-Riley has not requested permission to appeal that portion of the Judge’s order.

present “just.”

An examination of the Judge’s analysis confirms that it is fair and just to permit the Acting General Counsel to amend the Complaint to allege that the strike that began in 2019 is an unfair labor practice strike. The allegation is critical to issues of voting eligibility that may be raised in the decertification petitions currently pending before the Board, which granted a request for review on February 8, 2021. 370 NLRB No 85 (2021). While it is not known what will occur next with respect to the decertification petitions, if the Board reverses the Regional Director’s dismissal of either of the petitions there is likely to be a hearing on challenged ballots and/or objections following counting of ballots. In such event the status of the strike as an unfair labor practice strike will be critical to eligibility issues as well as to other potential hearings.

The Region made a decision that the July 2019 strike was an unfair labor practice strike in its November 11, 2020 dismissal of decertification petitions. (page 5, footnote 5). Only after the announcement of this decision and then only when the Board granted review of this decision on February 8, 2021 was it clear that litigation of this issue was potentially necessary. The Acting General Counsel has moved to amend the Complaint with respect to the unfair labor practices that will logically be alleged to form the basis for the strike. It is timely and with the numerous postponements that have accompanied this litigation, will allow Respondent an opportunity to litigate this issue. It is crucial to permit this amendment as it may otherwise foreclose litigation of eligibility issues for strikers and replacement employees which are within the control of the Acting General Counsel for the benefit of employee rights to vote in an election. If the Acting General Counsel has been slow to make this allegation, which the Union disputes, it nonetheless should not operate to the detriment of employee rights to vote in an election or otherwise obtain remedial relief.

The Judge's decision herein is evaluated under an abuse of discretion standard. Murrill Electric, LLC, 352 NLRB 784 n 1 (2008). The Judge's order is an issue of judicial discretion which should be upheld unless it is arbitrary or capricious or otherwise an abuse of discretion. Graphic Arts International Union, 230 NLRB 1219 n 4 (1978).

The gist of Rieth-Riley's argument against the Judge's order granting the motion to amend is to dispute the issue on the merits. It argues that the strike had nothing to do with the allegations of the Complaint in 07-CA-234085, an argument it may pursue when evidence is presented but is not relevant to the issue to be litigated. Its self-serving view of the merits of the allegation do not address the issue of the propriety of the amendment.

Rieth-Riley also appears to argue that the issue of the unfair labor practice strike should be litigated in the representation case, which ignores Board law, noted by the Administrative Law Judge, that this issue can only be litigated only in an unfair labor practice case, not a representation case. Times Square Stores Corp., 79 NLRB 361, 364-65 (1948).

Finally Rieth-Riley speculates as to the rights and interests of third parties of which it has no apparent knowledge.

None of the arguments presented by Rieth-Riley in its request for permission to file a special appeal demonstrate an abuse of discretion by the Judge or reason to permit a special appeal. Accordingly, the Union urges the Board to deny the request for permission to file a special appeal.

Respectfully submitted this 28th day of April 2021.



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Dated: April 28, 2021

CERTIFICATE OF SERVICE

AMY BACHELDER, being first duly sworn, deposes and says that on the 28th day of April 2021 she served a copy of **Charging Party Union's Brief in Opposition to Respondent Rieth-Riley's Request for Special Permission to Appeal Order of Administrative Law Judge** upon the following via email:

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